

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

ABENROTH, et al.,)	
)	No. 97-2-0060c
Petitioners,)	
)	ORDER RE:
)	BAYVIEW UGA
	v.)
)	
SKAGIT COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
TOM and SHEILA BUGGIA, et al.,)	
)	
Intervenors.)	
_____)	

In our January 23, 1998, final decision and order (FDO) we determined that the designated nonmunicipal urban growth area (UGA) at the Bayview Ridge (Bayview) area outside of the land owned by the Port of Skagit County (Port) did not comply with the Growth Management Act (Act, GMA). We also found that the designation substantially interfered with the goals of the Act. On April 28, 1998, Skagit County filed a motion to rescind the invalidity for the Bayview UGA outside of Port property. As a result of the 45-day limitation of RCW 36.70A.330(2) a hearing was held on June 2, 1998. Prior to the hearing, intervention status was granted to G & D Wallace Incorporated and Jack Wallace (Wallace). Skagit County and Wallace filed opening briefs and exhibits. The City of Anacortes filed a brief in response to Skagit County. Friends of Skagit County also filed a brief and submitted exhibits.

All parties agree, as do we, that under RCW 36.70A.320(4) the County has the burden of proving that its action no longer substantially interferes with the fulfillment of the goals of the GMA. The County acknowledged that its recent actions concerning Bayview were not designed to comply with the Act, but merely to remove the invalidity determination.

Prior to the hearing the County moved to admit Exs. 1502, 1503, and 1504. After hearing arguments on June 2, 1998, we granted the County's motion and those exhibits are now part of the record in this case.

The County's actions subsequent to the finding of invalidity commenced with adoption of Ordinance #16875. That ordinance provided that the County would not accept any applications for development or construction of new structures on property designated commercial/industrial (C/I) in the Bayview UGA outside of Port property. The ordinance stated that it would be in effect for a period of six months or until the invalidity order in this case had been lifted, whichever came first. The ordinance referred the matter to the planning commission for a recommendation concerning continuing the suspension of applications or proposing a change in the boundary designated for C/I development.

The planning commission held a public hearing on March 31, 1998. The basis upon which the planning commission proceeded was a report from staff dated March 17, 1998, (Ex. 1497). The planning commission recommended adoption of the designated Bayview UGA for C/I development as established by Ex. 1497, and for the reasons contained therein. The Board of County Commissioners considered the recommendation at a public meeting and adopted it in Ordinance #16958 on April 14, 1998. By its terms, the ordinance only becomes effective if the finding of invalidity is rescinded. Since the staff report in Ex. 1497 was the focal point upon which the adoption occurred, we will primarily reference that report in our discussion on whether the County has met its burden of showing that substantial interference with the goals of the Act no longer applies.

As noted by the County, the ordinance, if and when it becomes effective, does not re-designate the residential areas of the Bayview UGA found invalid in our FDO. The County also has in process a draft concurrency ordinance to establish urban level of service standards in all UGAs. Specifically for the Bayview UGA, a draft interlocal agreement with the City of Burlington is in process. These measures involve a significant progress by the County towards removal of the finding of invalidity, and even compliance. Nonetheless, because of the problems discussed below, we determine the County has not sustained its burden of proof showing, at this time, that

the Bayview UGA no longer substantially interferes with the goals of the Act.

Initially, we view rescission of invalidity in the same way that we view compliance. In *Port Townsend v. Jefferson County*, 94-2-0006c (order dated December 14, 1994) we stated that our review after remand was to determine whether compliance had been achieved, not necessarily whether the recommendations contained in the FDO had been followed. The same holds true with regard to invalidity. A local government is not required by the Act to specifically follow our recommendations, but is required to take action to remove substantial interference.

That being said, the County correctly observed that the primary substantial interference resulted from the residential designations contained in the Bayview UGA. The implication set forth in the County's argument here, that the C/I designations were not of significant concern, is misplaced. Throughout the FDO, we noted that the County had inappropriately designated commercial and industrial locations. Those designations were subject to only the County's current (pre-GMA) zoning code. The inappropriate designation analysis applied equally to both the sizing of and usages allowed countywide and within the Bayview UGA. As we pointed out at p. 22 of the FDO, if local governments delineate large UGAs there must be measures *in place* "to ensure development is truly urban in nature and efficiently phased." We noted that the GMA does not allow *sprawling, business as usual densities and usages* to continue. The Bayview UGA was specifically addressed at p. 23:

"The Port of Skagit County's master planned portion of the UGA is in compliance with the Act. The Port's analysis show that its land is well planned for, will be efficiently served, and will provide for *industrial uses compatible with the airport*...."

If the County wishes to include the additional C/I area not owned by the Port, *strong provisions must be in place* to preclude conversion to residential sprawl and ensure development at urban standards." (Italics supplied).

We noted at p. 31 of the FDO that there was a lack of compliance with regard to UGA phasing and timing. At p. 36, we observed that the County simply maintained its existing C/LI (commercial/light industrial) and M (industrial) zoning without further analysis as to compatibility within the designations. We observed at p. 47, that the anti-sprawl provisions of Goal 2 included urban commercial and urban industrial sprawl as well as residential. *See WEAN*

v. Island County, 95-2-0063 (order dated October 6, 1997). We noted on p. 4 of the findings of fact, at line 16, that the County had authorized large existing C/I designations in both the municipal and the Bayview UGAs.

While the draft concurrency ordinance and proposed interlocal agreement with Burlington are positive steps by Skagit County, they are admittedly not completed. These or similar “strong provisions” must be “in place” in order to remove the substantial interference. The GMA process envisions often significant changes to initial drafts to ordinances and proposed interlocal agreements. As noted in countywide planning policies (CPPs) 1.7, 2.1 and 2.2 such provisions are necessary to ensure UGA development at urban standards and preclude low-density sprawl. The CPPs are reiterated in the comprehensive plan at section 4.7 and objectives 3 and 4. These materials were discussed in the staff report found at Ex. 1497.

There are additional difficulties presented by this record and the County’s arguments that prevent us from finding substantial interference has been removed. As its fundamental premise, the County relied upon CPP 1.1 adopted October 23, 1996. CPP 1.1 assigned undeveloped C/I land allocations throughout the county. Included was an allocation of 497 undeveloped acres (of which 254 was assigned to the Port) for the Bayview area. The difficulty in relying upon CPP 1.1 is that we found in the FDO that those allocations did not comply with the Act and specifically for the Bayview area, substantially interfered with the goals of the Act. The County accurately pointed out that the Court of Appeals has recently affirmed the directive nature of CPPs in *King County v. Friends of the Law*, __WA__, 951 P.2d 1151 (March 1998). What the County overlooked was that the Court of Appeals also held that the CPPs must be consistent with the GMA in order to have such directive effect. In this case we have already ruled in the FDO that CPP 1.1 is inconsistent with the GMA.

Additional problems are demonstrated by the analysis contained in Ex. 1497 and the exhibits upon which it relied. Many valid arguments were made by the County, by Intervenor Wallace and by the exhibits that certain industrial uses were compatible with existing uses and could remove substantial interference. The fundamental inconsistency with the GMA was that the designation assigned by the County to the Bayview UGA resulted in C/LI zoning. As noted above, the County is using its pre-GMA development regulations (DRs) as its zoning code. The

County acknowledged at the hearing that some of the area in the proposed UGA is zoned M under Skagit County Code (SCC) 14.04.060. In addition to the usual industrial and manufacturing permitted uses, that provision allows retail and accessory use activity as permitted uses. The C/LI zoning found in SCC 14.04.070 allows as a permitted use “any use commonly accepted as business,... any use commonly accepted as commercial and any accessory uses.” The section further states that those permitted uses are to be defined in their “broadest terms.” There is no analysis in this record, particularly in Ex. 1497, that even addresses commercial or retail uses in the Bayview UGA. The C/I designation has suddenly been transformed into unlimited commercial/retail space.

In response to a question at the hearing, the County argued that the Washington- State- Department-of-Transportation-recommended safety zones around the airport would prohibit large-scale commercial uses. The County later acknowledged that it had not adopted those recommendations as part of its DRs.

Ex. 1497 stated that much of the Bayview UGA outside the Port property was characterized by “existing C/I development and is served by public facilities and services.” The exhibit went on to state that approximately 1/3 of the acreage in the designated area involved “existing industrial or public uses” with facilities and services. There was no discussion of any existing commercial or retail uses.

At p. 5 of Ex. 1497, the report stated that the proposed boundary revision (which was adopted) would add 975 gross acres of C/I land to the Bayview UGA. Of that amount, the report stated that 352.7 acres were currently developed. A review of Ex. 1480, which listed all of the current “industrial and public uses,” revealed a total of 375 acres, which did not include one business that did not report its acreage. Paragraph 5 used a 20% infrastructure reduction to reach a net of 500 “gross developable acres not considering market or critical areas.” The exhibit then unilaterally adopted the March 1998 market factor report from E.D. Hovee and Company (Ex. 1476).

The calculations used at p. 2 of Ex. 1476 started with a total zoned acreage amount of 2,580. This was significantly different than the allocation found in CPP 1.1 of 2,256 acres. Unlike the staff report (Ex. 1497) which used a current development acreage size of 352, the Hovee report

(Ex. 1476) used existing developed land acreage of 370. Both of these differ from Ex. 1480 which showed 375 plus acres already developed.

Ex. 1476 then inexplicably deducted 1,458 acres as “not available for development.” The County argued at the hearing that since Port property contained some 50% wetlands and buffer areas, the County was assuming the same would hold true for the non-Port property. There was no evidence to support this assumption. Ex. 1497 also specifically stated that it was not considering critical area deductions.

The Hovee report (Ex. 1476) deducted approximately 10% as “acreage for infrastructure,” instead of the 20% noted in Ex. 1497 as the official County figure. Incredibly enough, both exhibits ended up with approximately 500 acres as available within the designated UGA. How that coincidence occurred could not be reconciled no matter how many times we reviewed the figures. This record does not provide a set of consistent, understandable figures that would allow citizens or county decision-makers to reach informed conclusions.

The two exhibits additionally adopted a 50% market factor based upon conditions related solely to industrial designation, but did not include any commercial/retail analysis. Both exhibits stated that in other cases in Whatcom and Clark counties, we had allowed equal to or significantly higher market factors. In spite of the apparent County desire for us to do so in this case, we reiterate our position that we have not, do not, and will not adopt a one-size-fits-all approach to GMA compliance. The reference in the two exhibits to a 1.5 market factor in Whatcom County related to an order entered July 25, 1997, in cases 94-2-0009 & 96-2-0008, (order dated July 25, 1997) which rescinded invalidity for the Cherry Point industrial area in Whatcom County. A close review of the history of that order revealed that we found invalid the 1.5 market factor imposed by Whatcom County for commercial and non-industrial uses throughout the County. Even the July 25, 1997, order refused to rescind the invalidity for other commercial and industrial areas than the Cherry Point area because of a lack of analysis.

In various Clark County cases we have allowed a 50% market factor for industrial, but not commercial, designations within properly adopted UGAs. We have also found compliant a system adopted by Clark County that allowed for reservation of potential industrial sites beyond

the 20-year planning horizon. We have consistently found noncompliant and invalid secondary or tertiary industrial designations that used 50% market factors not shown by proper analysis to be needed within Clark County.

As the City of Anacortes argued, CPP 1.1 was adopted in conjunction with the cities. The County's unilateral changing of a market factor analysis in two different reports for the Bayview UGA did not use the same process used for the CPP adoption in 1996.

Finally, Ex. 1497 used the 50% market factor to result in a net undeveloped acreage for the Bayview UGA of 250 acres. Comparing that net acreage favorably with the 243 acres in CPP 1.1, the report concluded that the designation was proper. What the report did not address was that the 250 acres also compared favorably with the 254 acres assigned to the Port, which acreage was not included in that part of the analysis. This would have the effect of doubling the CPP allocation.

In summary, we find that the County has not sustained its burden of proof for the following reasons. Although positive progress is being made, the County has not yet finalized and put into place the necessary provisions to ensure proper phasing and appropriate standards of urban growth and to prevent low-density sprawl. Reliance upon CPP 1.1 is misplaced and even using that as a basis, the record fails to reflect a consistent set of understandable figures for the proposed acreage involved in the Bayview UGA. The analysis that was done concerned only industrial development while the designation and current zoning would allow unlimited commercial/retail permitted uses. There was no analysis of C/LI compatibility, need and cost in this record. Staff reports which unilaterally adopted a 50% market factor were done without consultation with local government decision-makers. The market factor was not analyzed for its reasonableness as applied to C/LI zoning. There was no application or adoption of the Washington State Department of Transportation safety zone recommendations in a manner that would influence potential development in the Bayview area. There was no evidence that the percentage of wetlands and buffers outside of Port property is or is not the same as that found inside Port property.

For all of the above reasons, the motion of the County is denied.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-830(2), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 10th day of June, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member